1990

Bruno D'aston v. Dorothy D'aston, Lisa Aston, Eryck C. Aston : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

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BRUNO D' ASTON, Plaintiff/Appellee, vs. DOROTHY D' ASTON, Defendant.	)	Case No. 900223-CA
LISA ASTON, Co-Defendant,	)	Argument Priority 16
ERYCK C. ASTON, Co-Defendant/Appellant.	)	

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BRIEF OF APPELLANT ERYCK C. ASTON

Appeal by Eryck C. Aston from a Decree and Order

Entered by Ray M. Harding, Fourth District Court,

Utah County

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UTAH COURT OF APPEALS

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BRUNO D'ASTON,	)	
	)	
Plaintiff/Appellee,	)	
	)	
vs.	)	
	)	
DOROTHY D'ASTON,	)	
	)	
Defendant.	)	Case No. 900223-CA
	)	
LISA ASTON,	)	
	)	
Co-Defendant,	)	Argument Priority 16
	)	
ERYCK C. ASTON,	)	
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TABLE OF AUTHORITIES

The appellant, Eryck Aston, seeks an Order of this Court quashing the Writ of Execution previously issued in this matter, vacating the trial court's Order and Decree issued pursuant to the Writ, and directing that all of the property seized from Eryck be redelivered to him.

STATEMENT OF JURISDICTION

This appeal was poured over into this court by the Utah Supreme Court. Jurisdiction lies in this court pursuant to Article VIII, Section 3 of the Utah Constitution and U.C.A. §78-22a-3(2)j.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The proceeding on appeal was one to enforce a Writ of Execution. (R. 1703.)

1. The first issue on appeal is whether the reversal of the Decree of Divorce between Bruno D'Aston and Dorothy D'Aston, (the Decree from which the Writ of Execution was issued,) renders the Writ and all proceedings related to it, including the Order of March 9, 1990, void. This issue is one of law. The standard of review is for correctness. Brinkerhoff v. Schwendiman, 790 P.2d 587 (Utah 1990).

2. The second issue is whether the reversal of the underlying Decree of Divorce mandates the reversal of the proceedings between Bruno and Eryck where, because of the trial court's reliance upon the reversed Decree and Findings, and the exclusion of otherwise admissible evidence, Eryck was prevented from having a full and fair plenary hearing. The issue is one of

law. The standard of review is for correctness. Brinkerhoff, supra.

3. The third issue is whether the trial court erred in awarding attorney's fees to Bruno D'Aston as costs. This issue is one of law. The standard for review is correctness. Brinkerhoff, supra.

4. Additional issues for review are set forth in Appendix 1. These issues are material only if the court should determine that the reversal of the Decree of Divorce does not mandate the reversal of the Order on appeal.

STATUTES AND CONSTITUTIONAL PROVISIONS

Rule 69(a), U.R.C.P. states in part that:

> Process to enforce a judgment shall be by a writ of execution unless the Court otherwise directs . . . (Emphasis added.)

The full text of Rule 69(a) is attached.

STATEMENT OF THE CASE

This proceeding is part of the divorce action between Bruno D'Aston (Bruno) and Dorothy D'Aston. A Decree of Divorce between Bruno and Dorothy was entered in December, 1988. Eryck is Bruno's and Dorothy's son. In April of 1989, the plaintiff obtained, ex parte, a Writ of Execution pursuant to the Decree of Divorce. (R. 1707.) Using the Writ of Execution, Bruno seized coins, silver bullion and other items of personal property from Eryck's business.

In January of 1990, a three day hearing was held before the Honorable Ray Harding pursuant to the Writ of Execution. On March 9, 1990, Judge Harding executed an Order and Decree pursuant to the Writ and the Decree of Divorce which awarded part

of the seized property to Bruno and part of the property to Eryck. (R. 2325.)

Subsequent to the entry of the March 9, 1990 Order, this Court reversed the Decree of Divorce between Bruno and Dorothy and remanded the matter to the district court for further proceedings, including proceedings to determine the ownership and distribution of property which was the subject of the Writ. (D'Aston v. D'Aston, 136 U.A.R. 47 (Ut. App. 1990)). Many post-trial motions have been filed, the vast majority of which have not been considered or ruled upon by the trial court, including Eryck Aston's Motion under Rule 60(b) and other motions requesting that the trial court identify items of personal property to be included in its Order and Decree dated March 9, 1990. This appeal was originally lodged in the Supreme Court and poured over in this Court. Bruno D'Aston has cross-appealed.

STATEMENT OF FACTS

The following facts are relevant to the issues presented for review:

1. On December 15, 1988, the Fourth District Court entered a Decree of Divorce between Bruno D'Aston and Dorothy D'Aston. The Decree has appended to it a significant number of exhibits listing various items of coins and personal property which were awarded by the Decree of Divorce to Bruno D'Aston. (R. 467.)

2. In April, 1989, Bruno obtained a Writ of Execution and Assistance based upon the 1988 Decree of Divorce which directed the constable to,

> ". . . take into your possession all property described in the exhibits attached to the Decree wherever it may be located and hold it until further order of the court."

(R. 1708.)

3. On or about April 29, 1989, pursuant to the Writ of Execution and Assistance, Constables entered the business of Bruno's son, Eryck, and seized hundreds of items from the possession of Eryck. The items taken included silver dollars, bullion and collectable coins. (The inventory of the items taken is Trial Exhibit 15.)

4. In June of 1990, the Decree of Divorce was reversed by this Court and remanded to the district court. (D'Aston v. D'Aston, 136 U.A.R. 49 (June 14, 1990).) In its prior consideration of this divorce, this Court stated:

> . . . we reverse the trial court's property division and remand for enforcement of the 1973 postnuptial property agreement and then the division of the remaining property, if any, not controlled by it.

No subsequent Decree has been entered by the district court on remand.

5. The items of property seized from Eryck Aston were held without bond by Wells Fargo during the pendency of these proceedings. On June 12, 1989, the trial court agreed to set an evidentiary hearing with respect to the Writ. (R. 2067.) Bruno "claim[ed] the items to be his, which items were seized pursuant to a Writ of Execution out of this court." (R. 2130.) Bruno also claimed "all the items taken into possession by the constable, other than a 1988 twenty dollar gold piece and some other minor items, are property which was separate property of the [Bruno] and awarded to the [Bruno] as set forth in Exhibits 22 and 23, attached to the Decree, or was consigned property to which the [Bruno] is entitled to possession as set forth on

Exhibit 24, attached to the Decree." (R. 2183.) In January of 1990, a hearing was conducted before the Fourth District Court regarding the Writ of Execution. (R. 2209.)

6. Subsequent to the hearing, the Court made findings of fact, conclusions of law and entered an Order which awarded part of the property to Bruno and part to Eryck. (R. 2316-2330.)

7. A part of the property awarded to Bruno was claimed to have been obtained on consignment from an entity known as "1841." The principal of "1841" was Michael Graham, a resident of Oregon. Prior to the hearing, Eryck took Michael Graham's deposition. During the deposition, Mr. Graham testified under oath that he had never consigned any coins or bullion to Bruno Aston, that he would not have had the type of coins or bullion listed in the purported consignment documents to consign to Bruno, that he never had any Canadian coins like those consigned, that "1841" had never used forms similar to those which were part of the Exhibit 24 to the Divorce Decree. (Deposition, pp. 31, 35, 38, 41, 45, 68; Deposition published T. 500.) The trial court refused to admit this testimony, stating that:

> And the Court will hear no testimony on the issue of whether or not the consigned coins are the property of [Bruno] as that issue was decided by Judge Park. (T. 4, 5.)

In a subsequent order, the trial court stated that:

> "Ownership of these consigned items and any obligations that go with them is not the subject of this action." (R. 2315.)

SUMMARY OF ARGUMENT

The Writ of Execution and the subsequent Order and Decree entered pursuant to the Writ are void, ipso facto, as a result of the reversal of the underlying judgment. 38 Am. Jur. 2d,

Executions §12, 5 Am. Jur. 2d, Appeal & Error §955, 956. There cannot be an execution on a reversed judgment.

Because of the Decree of Divorce (now reversed), and Judge Hardings' rulings that the Decree precluded his consideration of crucial aspects of ownership, Eryck was denied a plenary hearing on the issues purportedly decided by Judge Harding. In effect, the district court applied principles of res judicata and collateral estoppel in reaching its decision. Because of the reversal of the Decree of Divorce, those principles should not have been applied.

The district court awarded Bruno attorney's fees in connection with the out-of-state deposition of Michael Graham. As a matter of law, the fees should not have been awarded.

Finally, if this court should determine that the first hearing should not be reversed as a matter of law, additional issues on appeal are set forth in Appendix 1 attached to and filed as a part of this brief.

ARGUMENT

I.

THE WRIT OF EXECUTION SHOULD BE QUASHED, THE ORDER REVERSED AND THE PROPERTY RETURNED TO ERYCK.

This proceeding between Bruno and Eryck involved property seized from Eryck pursuant to a Writ of Execution issued in April of 1989. The Writ of Execution was issued pursuant to the Decree of Divorce entered in December of 1988 between Bruno and Dorothy. (R. 1707.)

The Writ of Execution (R. 1708) directed the Constable to:

> ". . . take into your possession all property described in the exhibits attached to the

Decree wherever it may be located and hold it until further order of the court."

Based upon the Writ, the constable seized hundreds of items of personal property from Eryck's store, The Gold Connection.

Rule 69, U.R.C.P. begins by stating that "process to enforce a judgment shall be a writ of execution, unless the court otherwise directs . . . ." (Emphasis added.) The Decree of Divorce has now been reversed, D'Aston v. D'Aston, 136 UAR 47 (Utah App. 1990), and remanded to the district court for a redetermination of the property division between the parents.

A judgment is the life blood of a Writ of Execution. A Writ is the mechanism to enforce a judgment. Because the Judgment has been reversed, there remains no basis in law for the Writ of Execution to have been issued in the first instance or for the Order and Decree subsequently entered on March 9, 1990 to remain in effect. 38 Am. Jur. 2d Executions §12; Rest. Judgments, 2d §16; 5 Am. Jur. 2d, Appeal & Error §955, 956. When a judgment is reversed, all proceedings had under the judgment are ipso facto void and of no effect. All dependent proceedings and orders fall with the reversal of the judgment. 5 Am. Jur. 2d Appeal & Error, §955, 956.

In Zurich Insurance Co. v. Bonebrake, 320 P.2d 975 (Colo. 1958) a judgment was entered against the insureds of Zurich Insurance. A Writ of Garnishment issued against insurer and a garnishee judgment followed. While the garnishee judgment against Zurich was on appeal, the underlying judgment was reversed on appeal and remanded to the trial court. The Colorado Supreme Court, in the garnishee appeal stated that:

> The reversal of a judgment upon which a garnishment is based leaves nothing to sustain the judgment against the garnishee. . . . The existence of a valid judgment is a jurisdictional prerequisite to garnishment relief (citation omitted.) As the judgment in the main case has been reversed, and because it is made the basis of the garnishment, it must follow that the judgment in the garnishment proceeding cannot stand alone and must be reversed. 320 P. 2d 976.

In Lohman v. Lohman, 246 S.W. 2d 368 (Mo. 1952) the plaintiff procured an execution following the entry of a Decree of Divorce. The Decree was subsequently set aside. The appellate court determined that the Writ of Execution issued pursuant to the Decree fell with the Decree and the court quashed the Writ of Execution. This result is consistent with the law of judgments generally. Comment C to the Restatement of Judgments 2d, §16, states in part:

> If, when the earlier judgment is set aside or reversed, the later judgment is still subject to a post-judgment motion for a new trial or the like, or is still open on appeal, . . . a party may inform the trial or appellate court of the nullification of the earlier judgment and the consequent elimination of the basis of the later judgment. The court should then normally set aside the later judgment. (Emphasis added.)

This general principle has long been recognized. In Butler v. Eaton, 141 U.S. 240 (1891), a bank shareholder was involved in two actions brought by the bank. In a state court action, a judgment was entered in her favor which she used successfully in defense of a second federal court action. Both cases went up to the Supreme Court. The Supreme Court reversed the state court decision, and was then confronted with the issue of how to handle the second federal court decision. The United States Supreme Court stated:

> It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force or effect, and ought never to have existed. Why, then, should not we reverse the judgment which we know of record has become erroneous, and save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object. (at 244.)

In Phebus v. Dunford, 198 P. 2d 973 (Utah 1948), the Utah Supreme Court recognized, in a factually different context, the general rule that the reversal of a judgment or a decision of a lower court places the case in the position it was before the lower court rendered the decision, and vacates all proceedings and orders dependent upon the decision which was reversed. 198 P. 2d at 974.

In many respects, this case is similar to that of Kelly v. Scott, 298 P. 2d 821 (Utah 1956). In Kelly, supra, a realtor was granted a judgment for a commission earned for procuring a buyer for real estate. The Supreme Court subsequently determined in the action between the buyer and seller that there was no binding contract and that the sale was not enforceable. On the basis of the reversal of the judgment between the buyer and seller, the Supreme Court reversed the Judgment for the commission. Where the two proceedings are interwoven, as in Kelly and in this action, it is impossible to reverse the judgment upon which a subsequent claim is predicated without reversing the subsequent proceeding.

Applied to this matter, where the Writ of Execution was issued on a Decree of Divorce which has now been reversed, the Writ and all proceedings incident to it including the Order and

Decree of March 9, 1990, are ipso facto void. The Writ of Execution issued in April of 1989 should be quashed, and the property seized pursuant thereto should be redelivered to Eryck. Adams v. Jonathon Woodner Co., 475 A.2d 393, 398 (D.C. App. 1984).

II.

ERYCK WAS DENIED A FULL AND FAIR TRIAL PROCEEDING BECAUSE OF THE DECREE OF DIVORCE, WHICH DECREE HAS NOW BEEN REVERSED.

Apart from the Writ of Execution, the hearing which was conducted in this matter was so limited in scope and in evidence that it cannot stand alone as a full and fair trial. The proceeding between Bruno and Eryck was not a plenary proceeding.

The limited nature of the hearing was recognized both by the Court and Bruno. For example, in his minute entry dated June 12, 1989 (R. 2067), Judge Park set an "evidentiary hearing" with respect to the Writ. In Bruno's subsequent request to reschedule the hearing, he ". . . claims the items to be his, which items were seized pursuant to a writ of execution issued out of this court." (R. 2130.) Later, the "motion for an Order to deliver the properties to Bruno [was] scheduled for hearing by this Court commencing January 8, 1990." (R. 2186.)

During the course of the hearing on the Writ, the trial court made it abundantly clear to the parties on many occasions that the type of evidence which it would consider was limited by the Decree of Divorce. For example, at the outset the trial court stated as follows:

> And the court will hear no testimony on the issue of whether or not the consigned coins are the property of the plaintiff as that issue was decided by Judge Park. (T. 4-5.)

Later when Eryck attempted to introduce the testimony of Michael Graham regarding a significant number of coins and bullion that Bruno claimed he had obtained through consignment, Judge Harding excluded that evidence and limited its use to the impeachment of Bruno's testimony. (T. 499.) It was very clear from the outset that Eryck would not and in fact was not permitted to go behind the matters which Judge Harding considered to have been determined by the Decree of Divorce. This situation was made even more onerous because Judge Harding had not tried the divorce proceeding.

During the divorce proceeding, Bruno testified that he had coins from two consignments, one from Michael Graham's Company "1841" and a second from Al Schafer. (R. 538, 531-33, 536-37.) During the hearing on the Writ, Bruno acknowledged that the consignment from Al Schafer was not in fact a consignment. (T. 225.) Many of the coins which Bruno was awarded pursuant to the Decree and the Writ were based upon this consignment. (F.F. 21; R. 2322.) In fact, Bruno's testimony at the divorce trial that the coins were consigned allowed them to be awarded to him without any requirement that he account to Dorothy for their value. Bruno acknowledged his own misstatements on this subject. (R. 269, 268.) Because the coins from the consignment were awarded to Bruno by the Decree, Eryck was not permitted to attack the consignment or the divorce court's order that those coins were to be awarded to Bruno.

To make matters worse, Bruno then relied upon the Divorce Decree and its award of "consigned" coins to him as the sole basis for his claim to many of the items seized from Eryck.

The trial court effectively applied principals of res judicata and collateral estoppel to limit the evidence and the issues which it would consider in this proceeding. This collateral estoppel effect is reflected at length in the court's Findings of Fact, in particular numbers 18, 19 and 21. (R. 2319-2322.) Throughout its findings, the Court relied extensively on the Decree. Ultimately, the only items awarded to Bruno were those which the trial court believed had been awarded to Bruno by the Decree of Divorce.

The law is clear that the basis for res judicata or collateral estoppel is a final judgment. 46 Am. Jur. 2d Judgments §457; Lexington Developers, Inc. v. O'Neill Construction Co., Inc., 238 S. E. 2d 771 (Ga. A. 1977); Smith v. Smith, 793 P. 2d 407, 409 (Utah App. 1990). In this action, there is no final judgment, the Decree of Divorce having been reversed. There is no basis for the application of principles of collateral estoppel and res judicata.

Even apart from issues of collateral estoppel where, as here, a judgment is of such a nature that the rights of co-parties may be derivative or interdependent in nature and where the reversal as to some parties will result in injustice to others, that judgment as to the others should also be reversed. General Portland Land Development v. Stevens, 356 So. 2d 840, 842 (Fla. App. 1978).

The reversible consequences of the court's rulings and limitations on evidence is most readily observed in its rulings on the consignment. Graham testified in his deposition that the consignment to Bruno had never occurred. (Depo., p. 31, 35, 38,

41, 45, 68). The court refused to consider this testimony. (T. 499.) Given Graham's testimony on the issue of the consigned coins, and the court's determination that the testimony of Bruno was not particularly credible (R. 2238), without the Decree of Divorce the trial court there would have been no evidence to support a finding that the consigned coins allegedly from 1841 belonged to Bruno.

A second consignment of coins was allegedly received by Bruno from Al Schaefer. Judge Harding also refused to reconsider ownership of any of these consigned coins because of the Decree of Divorce. This refusal occurred even after Bruno changed his testimony that *there had never been a consignment from* Al Schaefer. (T. 264, 265.)

The exclusion of evidence on the consignments is significant. A different result would have necessarily followed had the evidence been considered. This is because Bruno relied entirely upon the Decree of Divorce to establish his rights to the consignment items. Under the standards of Rule 61, U.R.C.P., the trial court's reliance on the Decree and its limitation of the evidence constitute reversible error.

If the proceeding between Bruno and Eryck is anything other than the enforcement of the Writ of Execution, Eryck was denied a full and fair plenary hearing on the issues of ownership of the coins which were seized. [1]

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[1] In the event that this Court should disagree with the conclusion that Eryck was denied a plenary hearing, Eryck has set forth in Appendix 1 to this Brief his arguments as to why the findings and conclusions of the trial court were otherwise clearly erroneous, so as to warrant reversal.

III.

THE TRIAL COURT ERRED IN AWARDING BRUNO ATTORNEY'S FEES.

In its Memorandum of Costs (R. 2241 at 2242), Bruno included a claim for attorney's fees paid to an Oregon law firm of Dwyer, Simpson & Waldo in connection with the deposition of Michael Graham. Eryck objected to the inclusion of this item as a cost. (R. 2283 at 2287.) The Court awarded the attorney's fees as costs.

There is no authority in this state which would permit Bruno to recover any attorney's fees in connection with this action. Indeed, the trial court had a duty to guard against any excesses or abuses in the taxing of costs. Frampton v. Wilson, 605 P.2d 771 at 774 (Utah 1980). The trial court should have disallowed the attorney's fees. The judgment for costs should be reduced by the principal amount of $368.75.

CONCLUSION

For the foregoing reasons, the Order and Decree of the court dated March 9, 1990 should be reversed and all of the seized property should be returned to Eryck Aston.

DATED this 27th day of December, 1990.

Keith W. Meade
Attorney for Appellant

APPENDIX 1

This Appendix is filed by Eryck Aston in support of his contention that even apart from the effect of the reversal of the Divorce Decree, the trial court committed reversible error.

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OTHER AUTHORITIES:

ADDITIONAL ISSUES PRESENTED FOR REVIEW

In addition to the issues set forth in the main Brief, the following additional issues are presently on appeal:

1. The trial court did no apply the proper burden of proof. This error, coupled with errors on pivotal findings of fact and the admission of evidence, mandate reversal of the Order and Decree. As to the issues of law, the standard of review is for correctness. Brinkerhoff v. Schwendiman, 790 P. 2d 587 (Utah 1990). As to the fact issues, the standard for review is whether or not the findings of fact are clearly erroneous. Sweeny v. Kimball, 786 P. 2d 760 (Utah 1990).

2. The district court erred in applying principles of res judicata and collateral estoppel to refuse evidence regarding the ownership of consigned and other property included in the Decree of Divorce. This issue is one of law. The standard of review is for correctness. Brinkerhoff, supra.

3. Even if the trial court's Decree and Order are otherwise correct, the judgment and subsequent distribution of the property was inconsistent with the trial court's own decision, and the matter should be remanded for reconsideration. This issue is one of law and fact. The standard for review is as set forth in paragraph 1 above.

4. The trial court erred in refusing to require Bruno to post a bond to hold the property pending the January, 1990

hearing. In addition, the trial court erred in establishing the supersedeas bond subsequent to its March 9, 1990 Order. The issues are ones of law. The standard of review is for correctness. Brinkerhoff v. Schwendiman, 790 P.2d 587 (Utah 1990).

STATUTES AND CONSTITUTIONAL PROVISIONS

No statutes or constitutional provisions are determinative of these additional issues on appeal. The additional issues discussed in Point IV involve Rule 64, U.R.C.P. and Article 1, §7, Constitution of Utah, both of which are attached.

ADDITIONAL STATEMENT OF FACTS

The following additional facts were proven at trial:

1. Eryck Aston got his start in the coin business by traveling to coin shows with his father, Bruno, on an average of about once a month. He acquired the nickname of "The Ten Percenter" because he earned a 10% commission on any merchandise he sold for his father at the shows. (T. 344, 345.) On occasion, his father would pay the commission with coins. Any money that Eryck earned on his 10% commission he put back into coins. (T. 345.) In addition, over the years, Bruno gave his son coins for birthdays and Christmas. (T. 345.) On occasion his father would give Eryck one or two tables at a show to display Eryck's coins. (T. 346.) Eryck and his father had business cards showing both of their names. (Exhibit 45.)

2. Eryck Aston first began collecting and dealing in coins in 1975. He has been a member of the Professional Coin Grading

Services, a national organization, and a lifetime member of the American Numismatic Association since 1975. Eryck Aston is a member of the National Silver Dollar Roundtable, a national "by invitation only" society. (T. 341.)

3. Prior to his parent's divorce, Eryck and his father got along fairly well. (T. 346.)

4. Eryck's specialty was Canadian and U.S. silver dollars. Eryck built his Canadian collection from the time he started in coins. Eryck also purchased Canadian coins at some of the shows with his father's assistance. (T. 346, 347.)

5. Eryck Aston opened his commercial store in January of 1989. In order to get in a position to have the inventory that was located in the store, Eryck took items on consignment. He borrowed money. He bought and sold cars at a car lot. He had done coin shows over a period of time during which he sold his better coins and used the proceeds to buy less expensive coins that would be more saleable to walk-in business traffic. He put his gun collection and basically everything that he owned in the store on display. (T. 353.)

6. At the trial, Eryck Aston presented original invoices for the purchase of hundreds of coins, many of which remained in his inventory at the store and were seized by the constable. Those invoices were introduced at trial as Exhibit 41.

7. Bruno Aston claims that Eryck Aston obtained possession of the items which were seized from his store by taking them from

Bruno's car and motorhome in April of 1986. Eryck Aston testified that he never took anything from his father. (T. 340.)

8. Bruno Aston testified that he marked his most valuable coins by stamping the coins on the rim at the top of the coin with a small "A." (T. 64.) Thirteen of the coins which were seized from The Gold Connection were coins bearing the stamped letter "A." (F.F. 18, R. 2370.)

9. Eryck testified that many of the coins that he had in his collection had an "A" stamped on them because they were either purchased from his father or were given to him by his father. (T. 350.)

10. Bruno testified that at one time or another he had owned every coin ever minted in the United States. He testified further that he had stamped some of his most valuable coins for many years. (T. 64.) In the divorce trial between Dorothy and Bruno, Bruno testified that he had given coins to Eryck bearing his stamped "A" on them, (T. 301). Bruno also testified at that trial that he "absolutely" sold coins bearing his stamped "A," (T. 301) and that on occasion he gave some of his "finest" coins to Dorothy in exchange for cash. (T. 229-230.) At the hearing between Eryck and Bruno, Bruno changed his testimony and denied having ever parted with any coins bearing the "A." (T. 188.)

11. Mr. Gary Fernandez, a dealer from California, testified that he had seen coins bearing Bruno's stamped "A" as part of Barbara Goldfried's collection. Barbara Goldfried was a coin collector in California. (T. 352.) Bruno, who had worked with

Goldfried, never denied that Barbara Goldfried had coins in her collection bearing his "A."

12. During the course of the trial, Bruno acknowledged that with respect to the coins which were before the Court that "apart from the "A," could be mine, could be not." (T. 217.)

13. Bruno Aston testified that he could recognize the bullion coins that were before the Court. (T. 85.)

14. With respect to the coins listed in the inventory of coins taken from Eryck's store (Exhibit 7), Bruno testified in part as follows:

(a) With respect to the coins on pages 2, 3 and 4, that those coins were "not identifiable, unless they are great rarities, of course" and that there were no rarities on those pages. (T. 204, 205.)

(b) That the coins on pages 5 and 6 of the inventory were not identifiable by him as having been his coins. (T. 206, 207.)

(c) With respect to the gold coins on page 8, that they are fairly common and "they could be anybody's. I have no way to identify, to say they are mine . . ." (T. 211.)

(d) With respect to the coins on page 8(b), Bruno agreed that there were no high quality coins there and that every coin shop in the country had some of those. (T. 215.)

(e) With respect to peace dollars, (page 8(b)) he agreed that apart from coins that had his stamped "A" on them,

there was no way that he could tell whether the coin had ever been in his possession, (T. 217).

(f) With respect to the gold pieces listed on page 12(b), that they were common and that he could not say whether they were his or anyone else's. (T. 221.)

(g) There was no testimony by Bruno that any of the other silver dollars were either BU (brilliant uncirculated) or CIRC (circulated) dollars, or that they had been included in the rolls of BU or CIRC coins Bruno claimed were missing. These coins were, nevertheless, awarded to Bruno. (Cf. Findings of Fact 19, p. 6.)

15. During the course of the hearing, Bruno Aston presented no testimony other than his own to support his ownership of the personal property seized from The Gold Connection.

16. Al Rust, a coin expert from Salt Lake City, who had been in the coin business in excess of 20 years at the time of hearing, testified as an expert witness as follows:

(a) That he did not know Eryck Aston. (T. 454.)

(b) That the silver dollars which were before the court were just about impossible to identify as having ever been in Bruno's possession. "Every coin store would have that same type of material." (T. 455.)

(c) That as a general rule he would have nearly all of the coins which had been seized in his store in one grade or another. While he didn't have the metric dollar (1879) on hand, he did not consider it unique. (T. 456.)

(d) Mr. Rust testified that perhaps the most unusual coin was the metric dollar. He graded it at probably an MS60 or 61. He stated that the value of the coin, based on then-current publications, was about $2,850.00. Bruno Aston had valued the metric coin which he claimed was taken from him at $12,500.00. (T. 460, 461; R. 2265.)

(e) Mr. Rust testified that he had examined the coins of the American West that Bruno claimed were part of a set. Mr. Rust testified that the coins before the court were not original coins having the $30,000.00 value claimed by Bruno as having been stolen, but were instead fantasy coins having a very nominal value. (T. 461.)

(f) Mr. Rust testified extensively from the list of coins seized from Eryck Aston's store and testified that without exception the coins were common, of relatively low value, and were readily available in coin stores. (T. 462-472.)

(g) Mr. Rust testified that one distinguishing factor of coins was their grade. During the course of his testimony, Mr. Rust testified that the coins before the court were not of a high grade and certainly not of the grade that Bruno D'Aston claimed had been taken. (T. 460-475.) (Bruno offered no expert testimony, and in most instances, no testimony at all, as to the grade of the coins.)

(h) Mr. Rust testified that with "most coins it's just about impossible to identify." (T. 491.)

(i) With respect to the coins which had been stamped with the letter A, Mr. Rust made the following analogy:

> If I had a hundred dollar bill and I put my name on it, Alvin Rust, and I take the serial number down, and I have all that information, and I own that hundred dollar bill and then it's taken by someone and it's spent and it's at the bank and I see my name on the hundred dollar bill, will the bank give me that hundred dollar bill because my name is on it and I have the number down that that's my bill? No, they will not because they have possession of it and it's their money. That A only shows he had title to it when it's in his possession. When it's out of his possession, that doesn't give him title to it. That's my opinion.

(T. 495.)

(j) That the odd sized silver bars before the court were bought and sold all the time. Mr. Rust testified further that the Mexican Libertads that were before the court were basically bullion coins. (T. 457.)

17. During the course of the hearing, Eryck testified as to the source of each item of personal property which was seized by the Constable. A summary of Eryck Aston's testimony is set forth at defendant's Exhibit 49.

18. As part of its Memorandum Decision, the court stated that there was a "lack of truthfulness which was apparent in the testimony of both parties." (R. 2338.) The Court stated that "the plaintiff's later inventories do not appear to have the same reliability as the original (police) report." (R. 2339.) (The police report was Exhibit 57.) Judge Harding ruled that items not listed by Bruno on the original police report list (Divorce

Trial Exhibit 161) were to be awarded to Eryck. (R. 2239 and 2240.) In spite of this decision and Order, and without any subsequent hearing being permitted, the trial court proceeded without explanation to award a vast majority of the items not listed in the police report to Bruno. (See Order dated July 9, 1990, bearing Judge Harding's signature stamped by the bailiff at a time when Judge Harding was and had been on vacation.) (R. 2526.)

19. Subsequent to the entry of the court's Order and Decree, the court has permitted no oral argument on any motions respecting the distribution of the seized property. In most instances, it has entered no ruling whatsoever. (R. 2441, other motions were not yet included in the record on appeal.)

SUMMARY OF ARGUMENT

1. The only testimony introduced at the trial by Bruno on the issue of his ownership of the coins and other property seized was his own testimony. Bruno was required to prove that he owned the seized property "with reasonable certainty." Burgess v. Small, infra. There were two types of coins seized from Eryck: i) 13 coins which were stamped with an "A," and ii) all other coins. Regarding the "A" stamped coins, Bruno testified in the divorce trial that he had traded and sold those coins to others and given some of those coins to Eryck. Bruno's testimony in this hearing was directly contrary to his prior testimony. The trial court found in its Memorandum Decision that Bruno's testimony was not credible. (R. 2238.) With respect to the

other coins, Bruno's testimony was that they were not identifiable. As a result, the evidence introduced by Bruno was insufficient as a matter of law to sustain his "with reasonable certainty" burden of proof.

2. In the divorce proceedings between Bruno and Dorothy, the District Court (Judge Park) made no determination regarding the ownership of the property listed in the numerous exhibits to the Decree. The divorce court awarded 70% of the value of the listed property, if and when located, to Bruno and 30% to Dorothy. The divorce court very carefully avoided any determination that any of the listed property had been or was owned by any of the parties. The divorce court made no determination that the "consigned" coins were the property of Bruno. In subsequent proceedings, the District Court (Judge Harding) erred by ruling that it would "hear no testimony on the issue of whether or not the consigned coins are the property of the plaintiff [Bruno] as that issue was decided by [the divorce court]." (T. 2.) The District Court's application of principles of res judicata and collateral estoppel to the proceeding between Bruno and Eryck was error because the issues had not been determined in the divorce proceedings and the divorce proceedings have now been reversed, so that there is no final judgment upon which to base res judicata.

3. Subsequent to the evidentiary hearing in this proceeding the District Court entered a Memorandum Decision finding that the only credible list of coins that Bruno had

prepared was the list which he gave to the police in 1986. The District Court awarded Bruno only coins which matched that list. In subsequent orders prepared and submitted by counsel for Bruno, many additional items of property and coins were included which were not included on the police list. There is no findings of fact or other basis in the record which would have permitted the trial court to include those additional items in its subsequent orders releasing property to Bruno. The inclusion of those additional items was reversible error.

4. Prior to the evidentiary hearing, all of the coins and property seized from Eryck was held without bond and without hearing. This conduct was a violation of Eryck's constitutional right of due process, Article I, Section 7, Utah Constitution, and of the requirements of Rule 64, Utah Rules of Civil Procedure. Subsequent to the evidentiary hearing, the trial court required a supersedeas bond of $150,000.00. This requirement was established at a time when the only evidence in the record on the value of the coins which had been awarded to Bruno was that the value of those coins did not exceed $31,000.00. There was also undisputed evidence in the record at that time that the value of those coins was unlikely to change during the pendency of the appeal. The court's establishment of the supersedeas bond at the amount of $150,000.00 was not supported by any evidence in the record and was error.

ADDITIONAL ARGUMENT

POINT I.

THERE WAS INSUFFICIENT EVIDENCE TO SATISFY BRUNO'S BURDEN OF PROOF AND TO SUPPORT PIVOTAL FINDINGS OF THE TRIAL COURT.

It is Eryck Aston's principle contention that this matter should be reversed for the reasons set forth in the main Brief. However, if this Court should determine that the hearing which is the subject of this appeal was a plenary proceeding, not reversible purely as a matter of law, the following discussion addresses additional errors which warrant reversal.

If the hearing was a plenary proceeding (which it was not), Bruno Aston was obligated to prove his title to each item of property seized from Eryck "with reasonable certainty." Burgess v. Small, 117 A. 2d 344 (Me. 1955). "Reasonable certainty" means "absence of doubt." Blacks Law Dict., 4th Ed. If Bruno's claim proceeded on a plenary basis, he was obligated to prove his ownership based upon the strength of his own evidence, and not based on Eryck's inability to prove ownership. Eggert v. Vincent, 723 P. 2d 527 (Wash. 1986).

There were two types of coins at issue in this litigation: a) those bearing an "A" stamped on the rim, and b) all of the other coins and bullion.

A. "A" Stamped Coins.

As to the coins bearing the stamped "A," Eryck claimed that the 13 "A" stamped coins had been given to him as gifts by his father over the years. Bruno, on the other hand, testified that

he had never given Eryck any coins bearing the stamped "A" and that he had never parted with any coins bearing the stamped "A." (T. 350, 188.)

However, at the divorce trial between Bruno and Dorothy, Bruno testified to the direct contrary about the stamped coins. For example, Bruno testified at the divorce trial that he gave Eryck coins bearing the stamped "A" (Divorce T. 301); that he had "absolutely" sold coins bearing the stamped "A" to others (Divorce T. 301). Bruno testified that he stamped his most valuable coins (T. 64) and testified in both proceedings that he had given some of his "finest" coins to Dorothy in exchange for cash (Divorce T. 148, 302).

Bruno's testimony in this hearing was the only affirmative evidence in support of the trial court's finding that the "A" stamped coins taken from Eryck were Bruno's. Bruno's testimony must be considered in light of i) the court's own statement that the testimony of Bruno was less than credible (R. 2238), ii) Bruno's changed testimony, iii Bruno's admission during the course of the hearing that he had misrepresented the Al Schafer consignment to Judge Park to avoid having to account to Dorothy for those coins (T. 264, 265); iv) the testimony of Gary Fernandez (a coin dealer from California) that he had seen the "A" stamped coins in the possession of others and that he (Gary Fernandez) in fact had "A" stamped coins in his possession at the time of the hearing (T. 302, 303); and v) Anthony Calcogno's (a California dealer) testimony that Barbara Goldfried (a California

collector) had coins in her collection with the stamped "A." (T. 352.) Bruno never denied that Goldfried had "A" stamped coins in her collection.

Bruno had the burden to prove ownership of the seized coins. Burgess v. Small, supra. Given Bruno's recognized lack of credibility, Bruno's about face testimony and the total absence of any corroborating testimony, the evidence which was before the trial court could not, as a matter of law, permit it to reach the conclusion that the "A" stamped coins seized from Eryck were, with reasonable certainty, Bruno's.

B. Bruno's evidence on the balance of the coins was insufficient to meet his burden of proof.

With respect to all of the unstamped material, Bruno had the burden of proving ownership "with reasonable certainty." He could not rely on Eryck's inability or failure to prove ownership. Burgess, supra; Eggert, supra.

On direct examination, in response to questions framed by his own counsel, Bruno claimed ownership of virtually every item which had been seized.

However, on cross-examination, when pressed, Bruno finally acknowledged that he could not identify the unmarked seized items as having ever been in his possession. For example:

T. 183	Bruno testified that bullion was not identifiable;
T. 204	Circulated dollars are not identifiable, unless great rarities;

T. 210	"How can I tell one 1908 St. Gaudin from another?"
T. 217	While talking about the peace dollars - "Apart from the A could be mine, could be not . . . ."

If the testimony of Eryck is excluded altogether on this subject, there remains the unopposed (by any other expert) expert testimony of Al Rust, a well-known Salt Lake City coin dealer, that none of the coins before the court were unusual, that the silver dollars that were seized were just about impossible to identify on an individual basis, that the bullion was not identifiable, that many coins similar to those which had been seized were available in Mr. Rust's own store, and that all of the coins could be readily obtained in a relatively short time even if they were not on hand. (T. 455, 456.) Even the allegedly unique 1879-S metric pattern dollar (which Bruno had never previously listed as having owned) was available for purchase through recognized trade publications for the sum of $2,850.00. (T. 460.)

Bruno had the burden of proving ownership of the seized materials. Eryck was not obligated to prove ownership. Eggert, supra. The version of the facts most favorable to Bruno would be his own testimony. On direct examination, Bruno claimed ownership of each item. On cross examination, even Bruno agreed that, with the exception of great rarities and the stamped "A," the coins were not identifiable. (T. 183, 204, 210, 217) (Bruno did not point to any great rarities, except possibly the 1879 metric.)

Bruno simply did not meet his burden of proof. The Court itself stated that it could only "reasonably infer" certain aspects of its findings. (F.F. 14, 15, R. 2319.) The standard of "reasonably infer" is on its face, much less than the burden of proving with "reasonable certainty." The court's "finding" that the "plaintiff has met his burden of proving ownership of many of the items . . ." (R. 2319, F.F. 18) is not a finding, but a conclusion unsupported even by Bruno's testimony. The finding is "clearly erroneous." The findings which flow from it, Findings 19 and 21 (R. 2320), are clearly erroneous for the same reason.

C. Additional pivotal findings are clearly erroneous.

In Finding of Fact No. 7, R. 2318, the Court stated that:

> Some of those items, while not exceptionally rare, would not be expected to appear in an average coin shop.

This finding is wholly unsupported by the record. There was no evidence at trial from any coin shop owner other than Eryck Aston and Alvin Rust. Mr. Rust testified that the coins were not unusual, that he had many of the same coins at his shop and that the others could be readily obtained. (T. 455, 456, 460, 461.)

D. Conclusion.

The cumulative effect of each of these errors is significant. This case was one where there was no direct evidence that any coins had been taken from Bruno. The trial court obviously reached its ultimate conclusion that it could "reasonably infer" certain things based upon assumptions which it

made. As discussed herein, many of those assumptions are not supported by the record and are contrary to the burden of proof and standard of evidence to be applied. The appellant's burden with respect to findings of fact is to demonstrate that they are "clearly erroneous." The findings discussed above are "clearly erroneous." With respect to the Court's conclusions of law, those are matters upon this Court is entitled to substitute its judgment based upon the findings of fact. The trial court's ultimate conclusion that the listed coins belonged to Bruno is not sustainable in the absence of the findings of fact discussed above and in light of the burden of proof which existed.

POINT II.

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO ADMIT EVIDENCE REGARDING CONSIGNMENTS AND OWNERSHIP OF OTHER PROPERTY.

The divorce proceeding between Bruno and Dorothy was very unusual because Bruno joined his two children, Lisa and Eryck. Lisa and Eryck, as co-defendants. The divorce dispute was between Bruno and Dorothy. As part of the Divorce Decree, the District Court included numerous exhibits listing items of personal property which it awarded to Bruno, allowing Dorothy an undivided interest in a percentage thereof. There was no issue in the divorce proceeding about who owned what. There were no issues tried between Eryck and Bruno regarding any of the property listed in the Exhibits to the Decree.

At the outset of these proceedings between Bruno and Eryck, Judge Harding ruled that "the court will hear no testimony on the

issue of whether or not the consigned coins are the property of the plaintiff as that issue was decided by Judge Park." (T. 2.) Judge Harding stated in an Order (R. 2315) that "ownership of those consigned items and any obligations that go with them is not the subject of this action." During the course of the trial, Judge Harding excluded the testimony of Michael Graham, the purported consignor to Bruno of a considerable number of coins, and limited the admission of his deposition solely to use for the purpose of attacking the credibility of Bruno Aston. (T. 499.)

A review of the Decree of Divorce reflects that Judge Park carefully avoided any determination as to whether or not a) coins had been taken from Bruno by Dorothy or Eryck, and b) whether or not a consignment of coins had actually occurred. For example, in paragraphs 8, 9, 10 and 11 of his Memorandum Decision (R. 444 and 445), Judge Park states that allegations have been made but makes no findings that any theft or misappropriation occurred. In paragraph 20 of his Memorandum Decision (R. 452), Judge Park stated that in the event the allegedly stolen coins were found to be in the possession of Dorothy, Eryck or Bruno, that possession would be considered contempt of the court. In paragraph 18 of his Memorandum Decision, Judge Park stated that he was not convinced that the value attributed by Bruno to the alleged stolen coins was realistic. It is apparent in these statements that Judge Park clearly avoided any determination as to whether

coins had been taken or whether a consignment had occurred. The court simply divided the value of all of the coins.

There was no dispute at the divorce trial between Bruno and Eryck over the consigned coins and no reason to dispute whether or not a consignment had occurred. There was no claim by Bruno in the divorce proceedings that the consigned coins were his coins. Certainly there was no determination in the divorce proceeding that coins which might be identical to those included within the consignment lists were owned by Bruno. And yet, in this proceeding, Judge Harding assumed as a starting point that the consignment lists were an incontestable basis of proof of Bruno's ownership of similar coins. (T. 2, R. 2315.) And Judge Harding refused to consider evidence to the contrary.

> The doctrine of res judicata is comprised of two branches: Claim preclusion and collateral estoppel or issue preclusion. Both branches are designed to protect litigants from the burden of relitigating an identical issue with the same party or his privy and to promote judicial economy by preventing needless litigation. Smith v. Smith, 793 P. 2d 407 (Utah App. 1990).

Both branches of the doctrine require that a final judgment have been entered. Smith, 793 P. 2d at 409. In this action, there is no final judgment in the divorce action, the Decree of Divorce having been reversed. In addition, there was never any claim preclusion because the ownership of the consigned coins by Bruno was never litigated in the Divorce Decree. In fact, Judge Park stated that anyone possessing them (even Bruno) would be in contempt. Eryck had no reason to believe at the time of the

divorce that if he owned similar coins that the "consignment" would later be used by Bruno as a sword to extricate those coins from him. And, most importantly, there was no determination that any consignment even occurred.

In the divorce proceedings, Bruno alleged that there were two consignments. The first consignment was allegedly from Al Schafer. During the hearing between Bruno and Eryck, Bruno candidly confessed that there was in fact no consignment from Al Schafer to him, and then claimed that all of the coins were actually his. (T. 264, 265.)

Prior to the hearing between Bruno and Eryck, the deposition of Michael Graham was taken in Oregon, where Graham resided. Graham testified in the deposition that he had never made any consignment of coins to Bruno, that the invoices upon which the consignment was purportedly written were not his invoices and that his business had never used such forms, and that his business had never had the type of coins or inventory in its possession which Bruno contended had been consigned to him. It was this evidence that the trial court refused to consider. (Graham's Depo. Trans. p. 31, 35, 38, 41, 45, 68; published. R. 2214.)

The items which Bruno claimed by virtue of the consignment are reflected in Exhibit 17, pages 2 and 3. Additional claims by Bruno to consigned coins are set forth in Exhibit 15 in his handwritten notes under the column entitled "grade." (Each of the references in Exhibits 15 and 17 to Exhibit 24 is to

consigned coins from Michael Graham.) Furthermore, Exhibit 22 from the first trial includes the coins which were listed in the alleged consignment documents. For example, on page 5 and 6 of Exhibit 22 (R. 524, 525) the Canadian coins listed match coin for coin those contained on pages 3, 4 and 5 of Exhibit 24. (R. 531-533.) They are the same coins. Bruno's claims to the coins listed on pages 4, 5 and part of page 6 of Exhibit 17 (from this hearing) are also based on the "consignments."

The effect of Judge Harding's refusal to consider evidence on the consignments was two-fold: a) it permitted Bruno to establish ownership based solely on the Decree of Divorce, and b) it barred Eryck from attacking the consignments which were the sole basis for Bruno's claim of ownership to many items. Bruno's confession that the consignment from Al Schafer did not occur and Judge Harding's refusal to consider whether or not the Graham consignment occurred means that no court has ever determined whether any consignment ever occurred. If no consignments occurred, Bruno offered no evidence to support a finding that he owned the "consigned coins."

Judge Harding's award of any consigned coins to Bruno should be reversed for several reasons. First, the trial court's reliance on collateral estoppel and res judicata was incorrect as a matter of law. Second, the trial court's refusal to consider evidence on whether or not a consignment had ever occurred denied Eryck a plenary hearing on the issue. Third, there was no

evidence, apart from the court's reliance on the reversed Decree, to support a finding that Bruno owned the consigned coins.

POINT III.

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN ITS INCLUSION OF CERTAIN ITEMS OF PROPERTY IN THE DECREE AND POST-TRIAL ORDERS.

Subsequent to the time that the court entered its Memorandum Decision and the time that the Decree and Order was entered in this matter, the appellant filed post-trial motions objecting to the proposed Findings of Fact and Conclusions of Law and to the Order and Decree. A hearing was had on those motions in early March and by an Order dated March 9, 1990, the court denied Eryck's post-trial motions. Also on March 9, 1990, the trial court entered its Order and Decree (R. 2325).

The Order purports to award to Bruno many items of personal property in excess of those described by the trial court in its Memorandum Decision dated January 31, 1990 (R. 2238). The Memorandum Decision determined that the most reliable evidence of property which had once belonged to Bruno was the original inventory of allegedly stolen property which Bruno gave to the police. (That inventory is a part of the record in this action as Exhibit 57.) However, in preparing the proposed Order (R. 2325) which was ultimately entered, Bruno included many additional items which were not contained in the police inventory, including the following:

A. An 18.5 gram gold nugget. The police inventory list made no reference to gold nuggets of any type. (Exhibit 18.)

The only gold nugget referred to by Bruno in any list was an 84.5 gram Alaska gold nugget referred to in Exhibit 30.

B. 84 common date BU-dollars (R. 2328) and 60 common date CIRC-dollars (R. 2328). There was absolutely no evidence before the trial court to support any finding that the 84 common date BU (brilliant uncirculated) and 60 common date CIRC (circulated) dollars listed in subsequent orders were included in the police list (Exhibit 57). In fact, Bruno's testimony was that this type of coin - common dates - could not be identified. (T. 204, 205, 206, 207, 211, 215.) The trial court made no findings of fact about these coins.

In subsequent orders and pleadings prepared by Bruno, extensive lists of these coins began to materialize. (R. 2524, 2525), including gratuitous language that

> "Note: No U.S. Dollars were awarded to Eryck." (R. 2525.)

There was no basis in fact, in the court's findings, in the Memorandum Decision or in the record to support the inclusion of such a statement in any order, or to support the inclusion of the extensive lists of coins included in later orders. (See R. 2524, 2525.) The inclusion of these items in the Order to Deliver Personal Property (R2522) represents overreaching on the part of the plaintiff and is not supported by any evidence in the record.

C. The 1914-S $20 U.S. gold piece. This coin (R. 2523) was not included in the police list, but was erroneously included in the Order and Decree.

D. Consigned coins. As discussed previously in Point II of this Appendix, the inclusion of any "consigned" items in the Order and Decree is error.

E. 1904-S U.S. $20 gold coin (R. 2523). This coin was not included in the police inventory list.

There are no findings by the Court which would support the inclusion of any of these items in any subsequent orders. The reasons for these errors probably lies in the failure of the trial court to tie together its memorandum decision, the police list (Exhibit 57) - which the Court found to be the only credible list of coins prepared by Bruno - and its subsequent Order (R. 2517). The Court allowed no hearings on Eryck's motions and objections and in fact, the Order to Deliver (R. 2517) was not even signed by the Judge, but stamped by a bailiff while the Judge was on vacation. It is very likely that the trial court has never considered that these discrepancies exist.

For these reasons, the Orders (R. 2325 and 2522) which divided the property are incorrect, inconsistent with the findings of fact, not supported by the record, and inconsistent with the trial court's own decision. (R. 2238.) The matter should be remanded, the Court ordered to remove these items from the Order to Deliver, and the items returned to Eryck.

POINT IV.

THE TRIAL COURT ERRED WITH RESPECT TO PRE- AND POST-HEARING BONDS.

A. Preliminary Proceedings. This action arose from a Writ of Execution. When the seizure of property from Eryck occurred

in April, 1989 there had been no prior determination that any of the items seized from Eryck were included in the Decree of Divorce. The trial court subsequently determined that many of the items which were seized were not among items included in the Decree of Divorce.

After the April, 1989 seizure occurred, Eryck moved the court to require Bruno to post a bond to protect his interest. (R. 2069.) At no time prior to the issuance of the Writ did Bruno or anyone on his behalf ever file an affidavit which contended that the items to be seized were items included in the Decree of Divorce. In effect, the trial court granted Bruno an ex parte pre-judgment attachment without the requirement of either a bond or an affidavit. Cf. Rule 64A, B and C, U.R.C.P.

In cases such as this where the ownership of property is disputed and no judgment has been entered with respect to its ownership, property may not be held solely upon the demand of the moving party without any requirement of prompt hearing or the filing of a bond. The relief which was granted to Bruno was a taking of property without due process of law. Article 1, §7, Constitution of Utah; Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W. T. Grantco, 94 S.Ct. 1985 (1974); and Bank of Ephraim v. Davis, 581 P.2d 1001 (Utah 1978).

The unconstitutionality of the Writ is further highlighted by the fact that it required the constable to assume that any coin or object fitting a certain description belonged to the

plaintiff. It was so vague that the constable was required to guess what items of property were to be seized.

The trial court's failure to allow a prompt hearing or to require a bond, violated Eryck's fundamental rights of due process.

B. The trial court erred in fixing the supersedeas bond. Subsequent to the trial and after the appeal had been filed, Eryck filed a motion in the district court requesting that the court establish a supersedeas bond to hold the property in place during the pendency of the appeal. (R. 2335.) At this time, the property had already been held by the court for approximately one year without any bond having been posted by Bruno. (R. 2335.) In support of his motion, Eryck filed an affidavit setting forth his opinion that the value of the coins awarded to his father by the Order and Decree did not exceed $31,000.00 in value. In response to the motion, Bruno filed no timely affidavit on the value of the property. At the hearing on May 4, 1990, the trial court struck the affidavit of Bruno Aston which contended that there was some higher value attributable to the coins which had been awarded to him. (R. 2417.) There had been no evidence during the course of the hearing on the value of the property. At the time of the hearing, the only evidence before the court with respect to the value of the coins awarded to Bruno was Eryck's affidavit. (R. 2363.)

At oral argument, Eryck contended that the bond should be established based upon any change in value which might occur

during the pendency of the appeal, but in no event should the bond be greater than the value of the property which had been awarded to Bruno ($31,000.00).

In its Order, the court directed Eryck to post a corporate surety bond in the amount of $150,000.00 to obtain a stay. (R. 2418.)

The standard for review on this issue is for abuse of discretion. Eryck contends that the court abused its discretion in establishing the supersedeas bond for the following reasons:

a. There was no evidence before the court on the value of the property other than Eryck's affidavit that the property was worth $31,000.00;

b. There was no evidence before the court that the change in value of the property during the pendency of the appeal would exceed the value of the property. In effect, the court pulled its $150,000.00 figure out of thin air.

The correct measure for the court to have considered in establishing the bond was the change in value of the property during the pendency of the appeal. 5 Am. Jur. 2d, Appeal & Error, §1058. The court's conduct in establishing a bond in an amount approximately five times the value of the property awarded to plaintiff was, under the circumstances, an abuse of discretion.

The point of the foregoing discussion is that if this matter should be remanded (and not reversed), Bruno should be required to both i) redeliver the property which has now been given to him

by the Clerk, and ii) post a bond to hold the property in the Court pending further proceedings in the district court. And if the matter should come up on appeal again, the supersedeas bond should not exceed the value of property being held.

CONCLUSION

For these additional reasons, the Order and Decree dated March 9, 1990 (R. 2325) should be reversed with all of the seized property being returned to Eryck.. In the alternative, and at a minimum, the matter should be remanded for the purpose of conforming the Order for Delivery (R. 2522) with the court's decision (R. 2238) and for further proceedings.

DATED this 27th day of December, 1990.

Keith W. Meade
Attorney for Appellant

PART VIII.

PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS.

Rule 64A. Prejudgment writs of replevin, attachment and garnishment.

Prejudgment writs of replevin, attachment and garnishment may be issued under the following conditions and circumstances:

(1) The writ shall issue only upon written motion and pursuant to a written order of the court.

(2) The court shall not direct the issuance of the writ without notice to the adverse party and an opportunity to be heard unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon.

(3) Every order authorizing the issuance of the writ granted without notice shall be endorsed with the date and hour of issuance and shall be filed forthwith in the clerk's office and entered of record. It shall define the injury and state why it is irreparable and why it was granted without notice. Such order, and any writ issued pursuant thereto, shall expire by its terms within such time after issuance, not to exceed ten days, as the court fixes, unless within the time so fixed the court shall, after notice and hearing, order the writ continued in effect, or unless the adverse party consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

(4) If the writ is issued without notice, a hearing thereon shall be set for the earliest reasonable time.

(5) At the hearing on the issuance of the writ or its continuance, the proponent for the writ shall have the burden of establishing the facts justifying its issuance and continuance.

(6) On two days' notice to the party obtaining the issuance of a writ without notice, or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification; and in that event the court shall proceed to hear and determine such motion, as expeditiously as possible.

(7) Any notice required under this rule shall be in such form and served in such manner as will expeditiously give the adverse party actual notice of the proceeding, all as directed by the court.

(8) In the event that property has been seized by the sheriff pursuant to the issuance of a writ without notice, such property shall be retained by him, subject to the order of the court.

(9) Except as herein provided, the provisions of Rules 64B, 64C and 64D shall continue to be and remain in full force and effect.

Rule 64B. Replevin.

(a) **Possession of personal property pending action.** Except as provided in Rule 64A and as authorized and permitted therein, the plaintiff in an action to recover the possession of personal property may, after the filing of the complaint and at any time before judgment, claim the delivery of such property to him as provided in this rule.

(b) **Affidavit.** When delivery is claimed, the plaintiff shall file with the court an affidavit, showing: (1) a description of the property claimed; (2) that the plaintiff is the owner of the property or has a special ownership or interest therein, stating the facts in relation thereto, and that he is entitled to the possession thereof; (3) that the property is wrongfully detained by the adverse party; (4) the alleged cause of the detention thereof according to the best knowledge, information and belief of affiant; (5) that it has not been taken for a tax, assessment or fine pursuant to a statute, or seized under an execution or an attachment against the property of the plaintiff; or if so seized, that it is by statute exempt from such seizure; (6) the actual value of the property.

(c) **Undertaking; issuance of writ; service.** Upon the filing of the affidavit, together with an undertaking with sufficient sureties to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the clerk of the court shall issue a writ requiring the sheriff or constable forthwith to take the property described in the affidavit and retain it in his custody until delivery as hereinafter provided. The sheriff or constable shall forthwith execute the writ and without delay shall serve on the defendant a copy of the affidavit, undertaking and writ; provided that if service cannot be made upon the defendant as provided for the service of process, such service shall be made by placing a copy of such papers in an envelope postage prepaid and addressed to the defendant at his last known address, and depositing the same in the nearest post office.

(d) **Exception to sureties; justification.** The defendant may, within two days after the service of a copy of the writ, serve and file a notice that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When the defendant excepts, the sureties must justify on notice to the defendant within five days, in the same manner as upon undertakings on attachment, and if they fail to justify within such time, the property shall be returned to the defendant; provided that the court may allow the giving of amended or additional undertakings required by this rule. If the defendant excepts to the sureties, he cannot reclaim the property, as provided in the next succeeding subdivision.

(e) **Redelivery of property; undertaking.** At any time before the delivery of the property to the plaintiff the defendant may, if he does not except to the sufficiency of plaintiff's sureties, require the return of such property by serving upon the sheriff and the plaintiff and filing with the court a written undertaking with sufficient sureties to the effect that they are bound in double the value of the property as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. The undertaking, and the undertaking required by Subdivision (c) of this rule, shall further provide that each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the undertaking may be served, and that his liability may be enforced on motion and on such notice as the court may prescribe without the necessity of an independent action.

(f) **Justification of defendant's sureties.** The plaintiff may, within two days after notice of the giving of the undertaking required in the next preceding subdivision, serve upon the defendant and the sheriff and file with the court a notice that he excepts to the sufficiency of the sureties. The sheriff shall thereupon hold the property in his possession until action upon such exception to the sureties. Justification of defendant's sureties shall be made in accordance with the provisions of Subdivision (d) of this rule.

(g) **Delivery of property.** Subject to the provisions of Rule 64A(8), if a return of the property is not required by the defendant within two days after the taking and service of the writ upon him, or if redelivery is required but defendant's sureties fail to justify and no amended or additional undertaking is given, the property must be delivered to the plaintiff, except as provided in Subdivision (i). If the defendant requires the redelivery of the property, and the plaintiff fails to except to defendant's sureties within two days, or upon the justification of defendant's sureties, the sheriff shall redeliver the property to the defendant.

(h) **Further powers and duties of sheriff and constable.**

(1) **Taking of property by force.** If the officer has probable cause to believe that the property or any part thereof is concealed or withheld in a building or inclosure, the sheriff must publicly demand its delivery. If it is not delivered, he must cause the building or inclosure to be broken open and take the property into his possession, and, if necessary, he may call to his aid the power of the county.

(2) **Disposition of property.** When the officer has taken the property in accordance with the provisions of this rule, he shall keep it in a secure place and deliver it to the party entitled thereto.

(3) **Return of the sheriff or constable.** The officer must file the writ, together with a return of his doings in the matter, with the court in which the action is pending, within twenty days after the original service thereof.

(i) **Claim to property by third party.** If the property taken is claimed by any person other than the defendant or his agent, and such person makes affidavit of his title thereto, or of his right to the possession thereof, stating the grounds of such title or right, and serves the same upon the officer, such officer is not bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand made on him, indemnifies the officer against such claim by an undertaking with sufficient sureties in an amount not less than double the value of the property.

Rule 64C. Attachment.

(a) **When attachment may issue; affidavit.** Except as provided in Rule 64A and as authorized and permitted therein, the plaintiff, at any time after the

filing of the complaint, in an action upon a judgment, upon any contract express or implied, or in an action against a nonresident of this state, may have the property of the defendant, not exempt from execution, attached as security for the satisfaction of any judgment that may be recovered in such action, unless the defendant gives security to pay such judgment as provided in Subdivision (f) of this rule, by filing with the court in which the action is pending an affidavit setting forth the following: That the defendant is indebted to the plaintiff, specifying the amount thereof as near as may be over and above all legal setoffs and the nature of the indebtedness; that the attachment is not sought to hinder, delay or defraud any creditor of the defendant; that the payment of the same has not been secured by any mortgage or lien upon real or personal property, situated or being in this state, or, if originally so secured, that such security has, without any act of the plaintiff or the person to whom the security was given, become impaired; and alleging, but not in the alternative, any one or more of the following causes for attachment:

(1) That the defendant is not a resident of this state;

(2) That the defendant is, a foreign corporation, not qualified to do business in this state;

(3) That the defendant stands in defiance of an officer, or conceals himself so that process cannot be served upon him;

(4) That the defendant has assigned, disposed of or concealed, or is about to assign, dispose of or conceal, any of his property with intent to defraud his creditors;

(5) That the defendant has departed or is about to depart from the state to the injury of his creditors;

(6) That the defendant fraudulently contracted the debt or incurred the obligation respecting which the action is brought;

(7) Such other additional facts showing probable cause for being, and that plaintiff is, justly apprehensive of losing his claim unless a writ of attachment issue.

(b) **Undertaking; issuance of writ.** The clerk shall issue the writ of attachment upon the filing by the plaintiff of the affidavit required by Subdivision (a) of this rule, together with a written undertaking on the part of the plaintiff, with sufficient sureties, in a sum not less than double the amount claimed by the plaintiff, but in no case shall an undertaking be required exceeding $10,000.00 or less than $50.00 in amount. The conditions of such undertaking shall be to the effect that if the defendant recovers judgment, or if the attachment is wrongfully issued, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking. Several writs may be issued at the same time to the sheriffs of different counties; and the plaintiff may have other writs of attachment as often as he may require at any time before judgment, upon the original affidavit and undertaking, if sufficient; provided, that writs governing personalty only may be directed to a constable.

(c) **Exception to sureties; justification.** Within five days after the levy of any attachment, the defendant may except to the sufficiency of the sureties, by serving and filing a notice of such exception. Within five days after such exception, the plaintiff's sureties, upon notice to the defendant of not less than two days, must justify before a judge of the court, or before the clerk thereof, and upon failure to justify, and if others in their places fail to justify, at the time and place appointed, the clerk or judge shall dismiss the writ of attachment.

(d) **Contents of writ; how directed.** The writ must be issued in the name of the state of Utah and shall be directed to the sheriff of any county in which property of the defendant may be, and must require him to attach and safely keep all the property of such defendant within his jurisdiction not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant gives him an undertaking as provided for in Subdivision (f) of this rule; provided, that writs governing personalty only may be directed to a constable.

(e) **Manner of executing writ.** The officer to whom the writ is directed must execute the same without delay, and, if the undertaking provided for in Subdivision (f) of this rule is not given, as follows:

(1) Real property, standing upon the records of the county in the name of the defendant, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached, and by leaving a similar copy of the writ, description and notice with an occupant of the property, if there is one, and if not, then by posting the same in a conspicuous place on the property attached.

(1a) Growing crops (which, until severed, shall be deemed personal property not capable of manual delivery), growing upon real property standing upon the records of the county in the name of the defendant, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the growing crops to be attached, and of the real property upon which the same are growing, and a notice that such growing crops are attached in pursuance of the writ, and by leaving a similar copy of the writ, description and notice with an occupant of the real property, if there is one, and if not, then by posting the same in a conspicuous place on the real property.

(2) Real property or an interest therein belonging to the defendant and held by any other person, or standing on the records of the county in the name of any other person, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property and a notice that such real property and any interest of the defendant therein held by or standing in the name of such other person, naming him, are attached, and by leaving with the occupant, if any, and with such other person or his agent, if known and within the county, or at the residence of either, if within the county, a copy of the writ, with a similar description and notice. If there is no occupant of the property, a copy of the writ, together with such description and notice, must be posted in a conspicuous place upon the property. The recorder shall index such attachment when filed, in the names both of the defendant and the person by whom the property is held, or in whose name it stands on the records.

(2a) Growing crops (which, until severance, shall be deemed personal property not capable of manual delivery), or any interest therein belonging to the defendant, and growing upon real property held by any other person or standing

upon the records of the county in the name of any other person, must be attached in the same manner as crops growing upon real property standing upon the records of the county in the name of the defendant are attached by the provisions of Subparagraph (1a) of this subdivision. The notice of attachment shall state that the crops therein described or any interest of the defendant therein, held by, or standing upon the records of the county in the name of such other person (naming him), are attached in pursuance of the writ. In addition, a similar copy of the writ, description and notice shall be delivered to such other person, or his agent, if known and within the county, or left at the residence of either, if known and within the county. The recorder must index such attachment when filed in the names of both the defendant and of the person by whom the real property is held, or in whose name it stands on the records.

(3) Personal property capable of manual delivery must be attached by taking it into custody, except as provided in the next succeeding paragraph.

(4) Cattle, horses, sheep, and other livestock, running at large and commonly known as range stock, between the 1st day of November and the next succeeding 15th day of May, must be attached by the sheriff's filing with the recorder of the county in which such stock is running at large a copy of the writ, together with a description of the property, specifying the number as nearly as may be with marks and brands, if any, and a notice that such range stock are attached; and such levy shall be as valid and effectual as if such stock had been seized and the possession and control thereof retained by the officer; provided that an attachment may, by direction of the plaintiff, be levied upon such range stock by taking the same into custody; but if additional costs are made by such levy, the same shall not be allowed to the plaintiff, if in the judgment of the court the taking of the property into the custody of the officer was unnecessary.

(5) Stocks or shares, or interest in stocks or shares, of any corporation or company must be attached by leaving with the president, secretary, cashier or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ and by taking the certificate into custody, unless the transfer thereof by the holder is enjoined or unless it is surrendered to the corporation issuing it.

(6) Debts and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits or other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits or other personal property in his possession or under his control belonging to the defendant, are attached in pursuance of the writ.

(7) When there are several attachments against the same defendant in different actions, they shall be executed in the order in which they are received by the officer.

(f) **Release of property or discharge of attachment; undertaking required; justification of sureties.** At any time, either before or after the execution of the writ of attachment, the defendant may obtain a release of any property or a discharge of the attachment, as follows:

(1) To secure a discharge of the attachment the defendant shall furnish a bond, with sufficient sureties, in a sum of not less than double the amount claimed by the plaintiff, but not less than $50.00 in amount. The conditions of such undertaking shall be to the effect that if the plaintiff recovers judgment, the defendant will pay the same, together with interest and all costs assessed against him, not exceeding the sum specified in the undertaking.

(2) To secure a release of property from the attachment the defendant shall furnish a bond, with sufficient sureties, in a sum not less than the value of the property to be released, but in no case in an amount greater than necessary to obtain a discharge of the attachment. The conditions of such undertaking shall be to the effect that if the plaintiff recovers judgment, the defendant will pay the same, together with interest and all costs assessed against him, not exceeding the sum specified in the undertaking.

(3) The undertaking required by Subparagraphs (1) and (2) of this subdivision shall be delivered to the sheriff or other officer having the writ where the release or discharge is obtained at or before the time of service of the attachment. Where the release or discharge is sought after the writ has been executed or the property attached, the defendant must apply to the court, upon reasonable notice to the plaintiff, for an order releasing such property or discharging the attachment. The undertaking required shall be filed with the court, and a copy thereof served upon the plaintiff. Within five days after notice of the filing of the undertaking required by Subparagraphs (1) and (2) of this subdivision, plaintiff may except to the sufficiency of defendant's sureties, by serving upon the defendant and filing with the court a notice of such exception. Thereafter defendant's sureties, or others in their stead, shall justify in the manner required for justification of plaintiff's sureties under the provisions of Subdivision (c) of this rule. Upon a discharge of the attachment or release of the property, all of the property released, if not sold, and the proceeds of any sale thereof, must be delivered to the defendant; provided that the release or discharge by the court shall not be effective until defendant's sureties have justified, or until the time for plaintiff's exception thereto has expired.

(4) The defendant may also at any time, upon such notice to the plaintiff as the court may require, make a motion to the court in which the action is pending, to have the writ of attachment discharged on the ground that the same was improperly or irregularly issued; provided however, that the court shall give the plaintiff reasonable opportunity to correct any defect in the complaint, affidavit, bond, writ or other proceeding so as to show that a legal cause for the attachment existed at the time it was issued.

(g) **Liability of sureties to be set forth in undertaking.** The undertaking required by Subdivisions (b) and (f) of this rule shall, in addition to other requirements, provide that each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the undertaking may be served, and that his liability may be enforced

on motion and upon such notice as the court may require without the necessity of an independent action.

(h) **Return of sheriff; inventory of property.** The officer must return the writ of attachment to the court within twenty days after its receipt, together with a certificate of his proceedings endorsed thereon or attached thereto. Such certificate shall contain a full inventory of the property attached. To enable him to make such return as to the debts and credits attached he must request, at the time of service, the party owing the debts or having the credits to give him a memorandum stating the amount and description of each; and if such memorandum is refused, the officer must return the fact of refusal with the writ.

(i) **Examination of defendant or third party.** The defendant may be required to attend before the court or a master appointed by the court, to be examined on oath respecting his property. Any person owing debts to the defendant, or having in his possession or under his control any credits or other personal property belonging to the defendant, may likewise be required to appear before the court or a master and be examined respecting the same. The court or master, after any examination conducted pursuant to this subdivision, may order personal property capable of manual delivery to be delivered to the officer, on such terms as may be just, having reference to any liens thereon or claims against the same, and may require a memorandum to be given of all other personal property, containing the amount and description thereof. The court may make such provision for witness fees and mileage as may be just, provided that if any third party has refused to give the officer executing the writ a memorandum of any debts or credits, requested under the provisions of Subdivision (h) of this rule, such party may be required to pay the costs of any proceeding taken for the purpose of obtaining such information.

(j) **Sale of attached property before judgment.**

(1) **Where property is perishable.** If any of the property attached is perishable, the officer must sell the same in the manner in which such property is sold on execution. The proceeds and other property attached by him must be retained by him to answer any judgment that may be recovered in the action, unless released or discharged, or subjected to execution upon another judgment recovered previous to issuing the attachment.

(2) **Other property.** Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court that the interest of the parties to the action will be subserved by a sale thereof, the court may order such property sold in the same manner as property sold under an execution, and the proceeds to be deposited in the court to abide the judgment in the action. Such order can be made only upon notice to the adverse party, in case such party has been personally served in the action.

(k) **Satisfaction of judgment; deficiency; redelivery of property.** If judgment is recovered by the plaintiff, the officer must satisfy the same out of the property attached by him which has not been delivered to the defendant or a claimant as herein provided, or subjected to a prior lien, if it is sufficient for that purpose, by paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him or so much as shall be necessary to satisfy the judgment; and, if any balance remains due and an execution shall have been issued on the judgment, by selling under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remains in his hands. Notice of the sales must be given and the sales conducted as in other cases of sales on execution. If, after selling all the property attached by him remaining in his hands and after deducting his fees and applying the proceeds, together with the proceeds of any debts or credits collected by him, to the payment of the judgment, any balance shall remain due, the officer must proceed to collect the same as upon an execution in other cases. Whenever the judgment shall have been paid, the officer, upon reasonable demand, must deliver to the defendant the attached property remaining in his hands and any proceeds of the property attached unapplied on the judgment.

(l) **Proceedings where defendant prevails.** If the defendant recovers judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the officer and all the property attached remaining in his hands must be delivered to the defendant, and the attachment shall be discharged and the property released therefrom.

(m) **Liability of third persons after attachment.** All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ of attachment shall be, unless such property is delivered up or transferred or such debts are paid to the officer, liable to the plaintiff for the amount of such credits, property or debts, until the attachment is discharged, or such debts, credits, or other personal property are released from the attachment, or until any judgment recovered by the plaintiff is satisfied. Payment of such debts, or delivery or transfer of such property or debts, to the officer shall be a sufficient discharge for the same as to the defendant.

(n) **Release of attachment upon real property.** Whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order must be filed in the office of the county recorder in which the notice of attachment has been filed, and shall be indexed in like manner.

(o) **Attachment before maturity of claim.** A party may commence an action upon an obligation before it is due and have an attachment against the property of the debtor upon any one or more of the grounds set forth in Subdivisions (a)(4), (5), (6) and (7) of this rule. The property attached, or its proceeds, shall be held subject to the judgment thereafter to be rendered; but no judgment shall be rendered on such claim until the obligation shall by its terms become due.

Rule 69. Execution and proceedings supplemental thereto.

(a) **Issuance of writ of execution.** Process to enforce a judgment shall be by a writ of execution unless the court otherwise directs, which may issue at any time within eight years after the entry of judgment, (except an execution may be stayed pursuant to Rule 62) either in the county in which such judgment was rendered, or in any county in which a transcript thereof has been filed and docketed in the office of the clerk of the district court. Notwithstanding the death of a party after judgment execution thereon may be issued, or such judgment may be enforced, as follows:

(1) In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interest.

(2) In case of the death of the judgment debtor, if the judgment is for the recovery of real or per-

sonal property or the enforcement of a lien thereon.

(b) **Contents of writ and to whom it may be directed.** The writ of execution must be issued in the name of the state of Utah, sealed with the seal of the court and subscribed by the clerk. It may be issued to the sheriff of any county in the state (and may be *issued at the same time to different counties*) but where it requires the delivery of possession or sale of real property, it must be issued to the sheriff of the county where the property or some part thereof is situated. If it requires delivery of possession or sale of personal property, it may be issued to a constable. It must intelligibly refer to the judgment, stating the court, the county where the same is entered or docketed, the names of the parties, the judgment, and, if it is for money, the amount thereof, and the amount actually due thereon. It shall be directed to the sheriff of the county in which it is to be executed in cases involving real property, and shall require the officer to proceed in accordance with the terms of the writ; provided that if such writ is against the property of the judgment debtor generally it may direct the constable to satisfy the judgment, with interest, out of the personal property of the debtor, and if sufficient personal property cannot be found, then the sheriff shall satisfy the judgment, with interest, out of his real property.

If the judgment requires the sale of property, the writ of execution shall recite such judgment, or the material parts thereof, and direct the officer to execute the judgment by making the sale and applying the proceeds in conformity therewith. The judgment creditor may require a certified copy of the judgment to be served with the execution upon the party against whom the judgment was rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court.

(c) **When writ to be returned.** The writ of execution shall be made returnable at any time within two months after its receipt by the officer. It shall be returned to the court from which it issued, and when it is returned the clerk must attach it to the record.

(d) **Service of the writ.** Unless the execution otherwise directs, the officer must execute the writ against the property of the judgment debtor by levying on a sufficient amount of property, if there is sufficient [property]; collecting or selling the choses in action and selling the other property, and paying to the judgment creditor or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within view of the officer, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated is amply sufficient to satisfy the judgment and costs.

When an officer has begun to serve an execution issued out of any court on or before the return day of such execution he may complete the service and return thereof after such return day. If he shall have begun to serve an execution, and shall die or be incapable of completing the service and return thereof, the same may be completed by any other officer who might by law execute the same if delivered to him; and if the first officer shall not have made a certificate of his doings, the second officer shall certify whatever he shall find to have been done by the first, and shall add thereto a certificate of his own doings in completing the service.

(e) **Proceedings on sale of property.**

(1) **Notice.** Before the sale of the property on execution notice thereof must be given as follows: (1) in case of perishable property, by posting written notice of the time and place of sale in *three public places of the precinct or city where* the sale is to take place, for such a time as may be reasonable, considering the character and condition of the property; (2) in case of other personal property, by posting a similar notice in at least three public places of the precinct or city where the sale is to take place, for not less than 7 nor more than 14 days; (3) in case of real property, by posting a similar notice, particularly describing the property, for 21 days, on the property to be sold, at the place of sale, and also in at least 3 public places of the precinct or city where the property to be sold is situated, and publishing a copy thereof at least 3 times, once a week for 3 successive weeks immediately preceding the sale, in some newspaper published in the county, if there is one.

(2) **Postponement.** If at the time appointed for the sale of any real or personal property on execution the officer shall deem it expedient and for the interest of all persons concerned to postpone the sale for want of purchasers, or other sufficient cause, he may postpone the same from time to time, until the same shall be completed; and in every such case he shall make public declaration thereof at the time and place previously appointed for the sale, and if such postponement is for a longer time than one day, notice thereof shall be given in the same manner as the original notice of such sale is required to be given.

(3) **Conduct of sale.** All sales of property under execution must be made at auction to the highest bidder, between the hours of 9 o'clock a.m. and 5 o'clock p.m. After sufficient property has been sold to satisfy the execution no more shall be sold. Neither the officer holding the execution nor his deputy shall become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property capable of manual delivery it must be within view of those who attend the sale, and it must be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. All sales of real property must be made at the courthouse of the county in which the property, or some part thereof, is situated. The judgment debtor, if present at the sale, may also direct the order in which the property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the officer must follow such directions.

(4) **Purchaser refusing to pay.** Every bid shall be deemed an irrevocable offer; and if the purchaser refuses to pay the amount bid by him for the property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss is occasioned thereby, the party refusing to pay, in addition to being liable on such bid, is guilty of

a contempt of court and may be punished accordingly. When a purchaser refuses to pay, the officer may also, in his discretion, thereafter reject any other bid of such person.

(5) **Personal property.** When the purchaser of any personal property pays the purchase money, the officer making the sale shall deliver the property to the purchaser (if such property is capable of manual delivery) and shall execute and deliver to him a certificate of sale and payment. Such certificate shall state that all right, title and interest which the debtor had in and to such property on the day the execution or attachment was levied, and any right, title and interest since acquired, is transferred to the purchaser.

(6) **Real property.** Upon a sale of real property the officer shall give to the purchaser a certificate of sale, containing: (1) a particular description of the real property sold; (2) the price paid by him for each lot or parcel if sold separately; (3) the whole price paid; (4) a statement to the effect that all right, title, interest and claim of the judgment debtor in and to the property is conveyed to the purchaser; provided that where such sale is subject to redemption that fact shall be stated also. A duplicate of such certificate shall be filed for record by the officer in the office of the recorder of the county. The real property sold shall be subject to redemption, except where the estate sold is less than a leasehold of a two-years' unexpired term, in which event said sale is absolute.

(f) **Redemption from sale.**

(1) **Who may redeem.** Property sold subject to redemption, or any part sold separately, may be redeemed by the following persons or their successors in interest: (1) the judgment debtor; (2) a creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold.

(2) **Redemption; how made.** At the time of redemption the person seeking the same may make payment of the amount required to the person from whom the property is being redeemed, or for him to the officer who made the sale, or his successor in office. At the same time the redemptioner must produce to the officer or person from whom he seeks to redeem, and serve with his notice to the officer: (1) a certified copy of the docket of the judgment under which he claims the right to redeem, or, if he redeems upon a mortgage or other lien, a memorandum of the record thereof certified by the recorder; (2) an assignment, properly acknowledged or proved where the same is necessary to establish his claim; (3) an affidavit by himself or his agent showing the amount then actually due on the lien.

(3) **Time for redemption; amount to be paid.** The property may be redeemed from the purchaser within six months after the sale on paying the amount of his purchase with 6 percent thereon in addition, together with the amount of any assessment or taxes, and any reasonable sum for fire insurance and necessary maintenance, upkeep, or repair of any improvements upon the property which the purchaser may have paid thereon after the purchase, with interest on such amounts, and, if the purchaser is also a creditor having a lien prior to that of the person seeking redemption, other than the judgment under which said purchase was made, the amount of such lien, with interest.

In the event there is a disagreement as to whether any sum demanded for redemption is reasonable or proper, the person seeking redemption may pay the amount necessary for redemption, less the amount in dispute, to the court out of which execution or order authorizing the sale was issued, and at the same time file with the court a petition setting forth the item or items demanded to which he objects, together with his grounds of objection; and thereupon the court shall enter an order fixing a time for hearing of such objections. A copy of the petition and order fixing time for hearing shall be served on the purchaser not less than two days before the day of hearing. Upon the hearing of the objections the court shall enter an order determining the amount required for redemption. In the event an additional amount to that theretofore paid to the clerk is required, the person seeking redemption shall pay to the clerk such additional amount within 7 days. The purchaser shall forthwith execute and deliver a proper certificate of redemption upon being paid the amount required by the court for redemption.

(4) **Subsequent redemptions.** If the property is redeemed by a creditor, any other creditor having a right of redemption may, within 60 days after the last redemption and within six months after the sale, redeem the property from such last redemptioner in the same manner as provided in the preceding subdivision, upon paying the sum of such last redemption, with three percent thereon in addition and the amount of any assessment or tax, and any reasonable sum for fire insurance and necessary maintenance, upkeep or repair of any improvements upon the property which the last redemptioner may have paid thereon, with interest on such amount, and, in addition, the amount of any lien held by such last redemptioner prior to his own, with interest. Written notice of any redemption shall be given to the officer and a duplicate filed with the recorder of the county. Similar notice shall be given of any taxes or assessments or any sums for fire insurance, and necessary maintenance, upkeep or repair of any improvements upon the property, paid by the person redeeming, or the amount of any lien acquired, other than upon which the redemption was made. Failure to file such notice shall relieve any subsequent redemptioner of the obligation to pay such taxes, assessments, or other liens.

(5) **Where no redemption is made.** If no redemption is made within six months after the sale, the purchaser or his assignee is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed and no other redemption by a creditor has been made and notice thereof has been given, the last redemptioner, or his assignee, is entitled to a sheriff's deed at the expiration of six months after the sale. If the judgment debtor redeems, he must make the same payments as are required to effect a redemption by a creditor. If the debtor redeems, the effect of the sale is terminated and he is restored to his estate. Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, duly acknowledged. Such certificate must be filed

and recorded in the office of the county recorder where the property is situated.

(6) **Rents during period of redemption.** The purchaser from the time of sale until a redemption, and a redemptioner from the time of his redemption until another redemption, is entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns to such redemptioner or debtor. If such purchaser or his assigns shall for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may, within sixty days after such demand, bring an action to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action the right of redemption is extended to such redemptioner or debtor.

(g) **Remedies of purchaser.**

(1) **For waste.** Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, upon motion, with or without notice, of the purchaser, or his successor in interest. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs or buildings thereon or to use wood or timber on the property therefor, or for the repair of fences, or for fuel for his family while he occupies the property. After his estate has become absolute, the purchaser or his successor in interest may maintain an action to recover damages for injury to the property by the tenant in possession after sale and before possession is delivered under the conveyance.

(2) **Where purchaser fails to obtain possession of property or is dispossessed thereof or evicted therefrom.** Where, because of irregularities in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, or because of the reversal or discharge of the judgment, a purchaser of property sold on execution, or his successor in interest, fails to obtain the property or is dispossessed thereof or evicted therefrom, the court having jurisdiction thereof shall, on motion of such party and after such notice to the judgment creditor as the court may prescribe, enter judgment against such judgment creditor for the price paid by the purchaser, together with interest. In the alternative, if such purchaser or his successor in interest, fails to recover possession of any property or is dispossessed thereof or evicted therefrom in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on motion of such party and after such notice to the judgment debtor as the court may prescribe, revive the original judgment in the name of the petitioner for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore; and the judgment so revived shall have the same force and effect as would an original judgment of the date of the revival.

(h) **Contribution and reimbursement; how enforced.** When upon an execution against several persons more than a pro rata part of the judgment is satisfied out of the proceeds of the sale of the property of one, or one of them pays, without a sale, more than his proportion, and the right of contribution exists, he may compel such contribution from the others; and where a judgment against several is upon an obligation of one or more as security for the others, and the surety has paid the amount or any part thereof, by sale of property or otherwise, he may require reimbursement from the principal. The person entitled to contribution or reimbursement shall, within one month after payment, or sale of his property in the event there is a sale, file in the court where the judgment was rendered a notice of such payment and his claim for contribution or reimbursement. Upon the filing of such notice the clerk must make an entry thereof in the margin of the docket which shall have the effect of a judgment against the other judgment debtors to the extent of their liability for contribution or reimbursement.

(i) **Payment of judgment by person indebted to judgment debtor.** After the issuance of an execution and before its return, any person indebted to the judgment debtor may pay to the officer the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the officer's receipt is a sufficient discharge for the amount paid.

(j) **Where property is claimed by third person.** If an officer shall proceed to levy any execution on any goods or chattels claimed by any person other than the defendant, or should he be requested by the judgment creditor so to do, such officer may require the judgment creditor to give an undertaking, with good and sufficient sureties, to pay all costs and damages that he may sustain by reason of the detention or sale of such property; and until such undertaking is given, the officer may refuse to proceed against such property.

(k) **Order for appearance of judgment debtor; arrest.** At any time when execution may issue on a judgment, the court from which an execution might issue shall, upon written motion of the judgment creditor, with or without notice as the court may determine, issue an order requiring the judgment debtor, or if a corporation, any officer thereof, to appear before the court or a master at a specified time and place to answer concerning his or its property. A judgment debtor, or if a corporation, any officer thereof, may be required to attend outside the county in which he resides, but the court may make such order as to mileage and expenses as is just. The order may also restrain the judgment debtor from disposing of any nonexempt property pending the hearing. Upon the hearing such proceedings may be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as on execution against such property.

In aid of an order requiring the attendance of the judgment debtor, the court may, upon satisfactory proof by affidavit or otherwise, that there is danger of the debtor's absconding, order the sheriff to arrest the debtor and bring him before the court, and may order such judgment debtor to enter into an undertaking with sufficient sureties, that he will attend from time to time before the court or master, as may be directed during the pendency of the proceedings and until the final determination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to jail.

(l) **Examination of debtor of judgment debtor.** At any time when execution may issue on a judgment, upon proof by affidavit or otherwise to the satisfaction of the court that any person or corporation has property of such judgment debtor or is indebted to him in an amount exceeding fifty dollars, not exempt from execution, the court may order such person or corporation or any officer or agent thereof, to appear before the court or a master at a specified time and place to answer concerning the same. Witness fees and mileage, if any, may be awarded by the court.

(m) **Order prohibiting transfer of property.** If it appears that a person or corporation, alleged to have property of the judgment debtor or to be indebted to him in an amount exceeding fifty dollars, not exempt from execution, claims an interest in the property adverse to such judgment debtor or denies such indebtedness, the court may order such person or corporation to refrain from transferring or otherwise disposing of such interest or debt until such time as may reasonably be necessary for the judgment creditor to bring an action to determine such interest or claim and prosecute the same to judgment. Such order may be modified or vacated by the court at any time upon such terms as may be just.

(n) **Witnesses.** Witnesses may be required to appear and testify in any proceedings brought under Subdivisions (k) and (l) of this rule in the same manner as upon the trial of an issue.

(o) **Order for property to be applied on judgment.** The court or master may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor, or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

(p) **Appointment of receiver.** The court may appoint a receiver of the property of the judgment debtor, not exempt from execution, and may forbid any transfer or other disposition thereof or interference therewith until its further order therein; provided that before any receiver shall be vested with the real property of the judgment debtor a certified copy of his appointment shall be recorded in the office of the recorder of the county in which any real estate sought to be affected thereby is situated.

CONSTITUTION OF UTAH

PREAMBLE

Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this CONSTITUTION. 1896

ARTICLE I

DECLARATION OF RIGHTS

Section 1. [Inherent and inalienable rights.]
All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right. 1896

Sec. 2. [All political power inherent in the people.]
All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require. 1896

Sec. 3. [Utah inseparable from the Union.]
The State of Utah is an inseparable part of the Federal Union and the Constitution of the United States is the supreme law of the land. 1896

Sec. 4. [Religious liberty — No property qualification to vote or hold office.]
The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution. 1896

Sec. 5. [Habeas corpus.]
The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it. 1896

Sec. 6. [Right to bear arms.]
The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms. 1985

Sec. 7. [Due process of law.]
No person shall be deprived of life, liberty or property, without due process of law. 1896

Sec. 8. [Offenses bailable.]
(1) All persons charged with a crime shall be bailable except:

MAILING CERTIFICATE

The undersigned hereby certifies that true and correct copies of the foregoing Brief of Appellant Eryck C. Aston were mailed, postage fully prepaid, on the 27th day of December, 1990, to the following:

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IN THE COURT OF APPEALS

OF THE STATE OF UTAH

BRUNO D'ASTON, Plaintiff-Appellee, vs. DOROTHY D'ASTON, LISA ASTON, and ERYCK C. ASTON, Defendants-Appellant.	:	**SUGGESTION OF MOOTNESS** Case No. 900223-CA

In accordance with the directive of Rule 37(a) of the Utah Rules of Appellate Procedure, appellee Bruno D'Aston hereby suggests to the Court that the above-entitled appeal is moot. The ground for this suggestion is that the appeal challenges the order of the District Court directing the distribution of certain personal property to the parties, and the property has already been distributed in accordance with the District Court's order.

This suggestion is supported by a memorandum of points and authorities which is filed herewith.

DATED this 28th day of February, 1991.

LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellee Bruno D'Aston

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand-delivered to the following this 28th day of February, 1991.

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IN THE COURT OF APPEALS

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